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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

2:10-CV-1951 JCM (PAL)

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LIBERTY MUTUAL INSURANCE  
GROUP,

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Plaintiff,

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v.

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PANELIZED STRUCTURES INC., et  
al.,

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Defendants.

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**ORDER**

16 Presently before the court is defendant Panelized Structures Inc.'s ("PSI") motion to dismiss  
17 (doc. #5). Plaintiff Liberty Mutual Insurance Group ("Liberty Mutual") responded (doc. #8), and  
18 defendant PSI replied (doc. #10). Defendant again replied with a supplemental reply to plaintiff's  
19 opposition to motion to dismiss (doc. #11).

20 **I. RELEVANT FACTS**

21 Plaintiff filed suit to enforce alleged contractual indemnification and equitable subrogation  
22 rights stemming from a worker's compensation insurance policy. This insurance policy, and  
23 customer agreement, existed between Arizona Labor Force d/b/a Allied Forces Temporary Services  
24 Inc. ("AFTS"), and defendant PSI. On May 1, 2004, plaintiff Liberty Mutual issued a worker's  
25 compensation insurance policy to AFTS, a foreign corporation qualified to do business in Nevada.

26 On or about September 1, 2004, defendant PSI entered into a customer agreement with  
27 AFTS, through which PSI agreed to indemnify AFTS against claims related to "damages to company  
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owned vehicles, machinery, or materials to which Allied Forces Temporary Services employees may be assigned.” (Doc. #1-1, compl. ¶ 15). Thereafter, an AFTS employee, Thomas Novick, was seriously injured when an agent or employee of defendant PSI ran over Novick with a rough terrain forklift leased by PSI, causing Novick to lose his leg.

Pursuant to the customer agreement, Liberty Mutual filed suit in state district court in Clark County Nevada, in 2006, asserting tort statutory subrogation rights, pursuant to N.R.S. 616C.215, to recover worker’s compensation benefits paid to Novick in excess of \$500,000. That case was consolidated with a negligence action filed by Novick, which now remains in state court.

Thereafter, Liberty Mutual filed a second suit alleging contractual indemnification and equitable subrogation in August of 2010. (Doc. #1-1). Before that case could be consolidated with the first action, the defendant removed the second suit to this court under the doctrine of diversity jurisdiction. (Doc. #1). Subsequently, defendant filed the instant motion to dismiss for failure to state a claim for relief, for failure to commence action on behalf of a real party in interest, and failure to join an indispensable party. (Doc. #5).

#### **I. MOTION TO DISMISS (doc. #5)**

Plaintiff Liberty Mutual seeks to enforce its contractual indemnification and equitable subrogation rights stemming from a workers compensation insurance policy and a customer agreement between AFTS and defendant PSI.

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim for relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “Where a complaint pleads facts that are ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557). However, where there are well pled factual allegations, the court should assume their veracity and determine if they give rise to relief. *Id.* at 1950.

1           A.     The Motion to Dismiss for Failure to Commence Action on Behalf of Real Party in  
 2                     Interest is Denied

3           Defendant argues that plaintiff fails to state a claim upon which relief can be granted alleging  
 4 that the plaintiff is not the real party in interest, and thus, is incapable of commencing this action  
 5 properly. However, the action before the court is brought in the name of “Liberty Mutual Insurance  
 6 Group,” and the worker’s compensation and employer liability policy, which was in effect when  
 7 Novick was injured, clearly indicates on the declaration page that it was issued by “Liberty Mutual  
 8 Insurance Group.”

9           Defendant also argues that the Secretary of State of Nevada business search reveals no results  
 10 for “Liberty Mutual Insurance Group.” It does however, find “Liberty Mutual Group Inc.”  
 11 Accordingly, defendant’s argument that “the named [p]laintiff is not the issuer of the policy” (doc.  
 12 5, p.1) fails. Defendant’s argument that plaintiff is a fictitiously-named party is unfounded and the  
 13 motion to dismiss for failure to commence action on behalf of real party in interest is denied.

14           B.     The Motion to Dismiss for Failure to State a Claim for Relief is Denied

15           Defendant argues that plaintiff’s complaint fails to state a claim upon which relief can be  
 16 granted because defendant is not obligated to indemnify AFTS under the terms and conditions of the  
 17 work order, or under the subrogation language of the worker’s compensation policy issued by Liberty  
 18 Mutual. This argument fails. The policy issued by Liberty Mutual clearly designates subrogation  
 19 rights in its plain language: “We have your rights and the rights of persons entitled to the benefits  
 20 of this insurance, to recover our payments from anyone liable for the injury.” (Doc. #8). This clearly  
 21 establishes that AFTS assigned its rights of recovery to Liberty Mutual.

22           Additionally, AFTS entered into a contractual customer agreement with the defendant where  
 23 PSI agreed to indemnify AFTS from bodily injury resulting from incidents involving machinery and  
 24 vehicles utilized by PSI. Specifically, the customer agreement provides: “The company [PSI] agrees  
 25 that Allied Forces Temporary Services does not insure it for damages to company owed vehicles,  
 26 machinery or materials to which Allied Forces Temporary Services employees may be assigned. The  
 27 Company [PSI] indemnifies Allied Forces Temporary Services against such claims, as well as  
 28

1 against bodily injury resulting from such incidents.” (Doc. #8).

2 Therefore, defendants motion to dismiss for failure to state a claim for relief is denied.

3 C. The Motion to Dismiss for Failure to Join Indispensable Party is Denied

4 Finally, defendant alleges that plaintiff’s complaint fails to join an indispensable party– that  
5 is, AFTS, which is a party to the work order/customer agreement with defendant.

6 Under Federal Rule of Civil Procedure 19, in order for a party to be “indispensable” or  
7 “necessary,” one of two requirements must be met. Rule 19(a)(1) states that a party is indispensable  
8 “if in the person’s absence complete relief cannot be awarded among those already parties.” In the  
9 alternative, Rule 19(a)(2) states that a judgment in the person’s absence will either (1) as a practical  
10 matter impair an interest the person has, or (2) impose on some of the existing parties “double,  
11 multiple, or otherwise inconsistent obligations.

12 Complete relief can be granted to those parties already joined in the instant action.  
13 Additionally, AFTS is neither a real party in interest, nor is it an indispensable party. Liberty Mutual  
14 paid all of the worker’s compensation benefits owed to Novick. AFTS did not incur any expenses  
15 or damages as a result of Novick’s injury. Therefore PSI would not be liable for double, multiple,  
16 or otherwise inconsistent obligations.

17 Furthermore, the Nevada Supreme Court in *Valley Power Supply v. Toiyable Supply Co.*, 80  
18 Nev. 458, 369 P.2d.137 (1964), ruled that the insurer who has paid for the entire loss is subrogated  
19 as a matter of law to the rights its insured may have had against the defendant. Thus, in a case of total  
20 subrogation, the insurer is the sole party in interest and may assert a claim against those thought to  
21 be liable.

22 The joinder of AFTS is not required as defined under Federal Rule of Civil Procedure 19.  
23 Consequently, the motion to dismiss for failure to join an indispensable party is also denied.

24 Accordingly,


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1 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants's motion to  
2 dismiss (doc. #5) is DENIED without prejudice.

3 DATED January 31, 2011.

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6 **UNITED STATES DISTRICT JUDGE**